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No. 93-336

In the Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD D. BARNETT, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the uncontroverted evidence established that petitioner was a responsible person who willfully failed to pay over to the United States the federal taxes withheld from the wages of employees of Anderson-Barnett Drilling Company, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 988 F.2d 1449. The opinion of the district court (Pet. App. 26a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1993. The petition for rehearing was denied on June 1, 1993. The petition for a writ of certiorari was filed on August 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, petitioner and Charles Anderson incorporated Anderson-Barnett Drilling Company, Inc. (Anderson-Barnett) to provide drilling services for oil and gas companies in southern Louisiana. Petitioner and Anderson each owned 20% of the corporation's stock and were members of its board of directors. Petitioner served initially as vice-president of the corporation. Anderson was its president and chief financial officer until March 1982, when petitioner succeeded him as president. Pet. App. 2a.

Anderson-Barnett maintained offices in Lafayette, Louisiana, where petitioner worked, and in Lake Charles, Louisiana, where Anderson worked. Petitioner's primary responsibility was directing the daily operations of the corporation's drilling rigs. Pet. App. 2a. Anderson's primary responsibility was managing the corporation's bookkeeping and financial affairs. *Id.* at 3a. Petitioner and Anderson shared other responsibilities. Petitioner reviewed bills from creditors and occasionally made recommendations to Anderson as to which creditors should be paid. Petitioner and Anderson conferred on major business decisions affecting the finances of the corporation, including the acquisition and financing of new equipment. *Id.* at 3a-4a.

Petitioner was an authorized signatory on the corporation's checking accounts and could sign checks without Anderson's permission. Petitioner often wrote checks to purchase supplies. On at least one occasion prior to becoming president, petitioner signed payroll checks when Anderson was out of town. After he became president, petitioner signed

numerous checks to pay employees and outside creditors. Pet. App. 4a-5a.

Beginning in 1981, the corporation experienced financial difficulties. By early 1982, corporate checks were often returned for insufficient funds. In response to these problems, petitioner met with creditors to restructure the corporation's financing and hired a new employee to help examine the corporation's financial records. Pet. App. 5a-6a. Petitioner then organized a directors meeting at which Anderson resigned as president. Petitioner then became president and seized the corporation's books and records from Anderson's office. These records revealed that Anderson had not been paying taxes withheld from employees' paychecks to the United States. On April 12, 1982, Anderson acknowledged to petitioner that the withheld taxes had, in fact, not been paid over. *Id.* at 6a.

After that date, more than $490,000 was deposited in the corporation's checking accounts.[1] Petitioner did not use any of these funds to pay the corporation's accrued withholding tax liability. Instead the funds were used by petitioner to pay employees and other creditors. Pet. App. 6a.

2. The taxes required to be withheld by the employer from an employee's wages represent income to the employee. The withheld amounts are credited as taxes paid by the employee, even if the employer fails to pay the taxes over to the Internal Revenue Service. To ensure the payment of those taxes over

[1] On April 13, 1982, an additional deposit of $375,000 was made in the corporation's accounts. The depository bank, however, immediately offset that deposit to satisfy an outstanding loan. Pet. App. 6a.

to the United States, Section 6672 of the Internal Revenue Code provides that any person who is "responsible" for the collection and payment of withholding taxes who "willfully" fails to discharge that responsibility is personally liable for the amount of the delinquent taxes. 26 U.S.C. 6672. See *Slodov* v. *United States*, 436 U.S. 238, 244-245 (1978); *United States* v. *Sotelo*, 436 U.S. 268, 274-275, 279-280 & n.13 (1978).

The unpaid withholding taxes of Anderson-Barnett for the second, third, and fourth quarters of 1981, and the first quarter of 1982 totalled $604,509.91. The Internal Revenue Service made an assessment of this amount against petitioner and Anderson under 26 U.S.C. 6672. Petitioner paid $200 in partial satisfaction of the assessment and brought this suit for refund in the district court. The United States counterclaimed for the remaining taxes due and joined Anderson in the action.

The district court granted summary judgment in favor of the government on its claim against Anderson. Pet. App. 7a. Petitioner's case was tried before a jury. The jury found that petitioner was not "responsible" for accounting and paying over the unpaid employment taxes during his tenure with Anderson-Barnett. The jury did not reach the question whether petitioner's conduct was "willful."

The district court denied the government's motion for judgment notwithstanding the verdict. The court stated that Anderson was the "responsible party" because "he hid everything from everybody else" and "he was totally in control" (Pet. App. 8a). The court concluded that it was therefore "just not fair" to hold petitioner liable (*ibid.*).

3. The court of appeals reversed. The court held that, applying the correct statutory criteria, petitioner was "responsible" as a matter of law for the payment of withheld federal taxes. Pet. App. 14a-15a. Because petitioner was "responsible" both before and after the withholding tax liability accrued, the court held that he was under a duty to use any unencumbered funds (including those acquired after the withholding tax obligation became payable) to satisfy that obligation. *Id.* at 21a. The court therefore held that, "as a matter of law, [petitioner] 'willfully' failed to pay the $492,101.12 in available, unencumbered funds deposited into Company bank accounts after [petitioner] became aware that the accrued withholding taxes were due" (*id.* at 23a). [2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. The official status, duty and authority of a corporate employee normally determine whether he is responsible under Section 6672 of the Internal Revenue Code for paying over withholding taxes owed to

[2] The United States did not argue on appeal that petitioner was liable for the $375,000 deposit that was offset by the depository bank for payment of an overdue loan. See note 1, *supra*. The government did contend that $425,000 of Anderson-Barnett's uncollected accounts receivable constituted a liquid asset that could have been used by petitioner to pay the withholding taxes. Pet. App. 23a-24a. The court of appeals rejected this argument because "[t]hat amount was simply not yet available for [petitioner] to use to pay the accrued taxes" (*id.* at 23a).

the United States. *E.g.*, *Turnbull* v. *United States*, 929 F.2d 173, 178 (5th Cir. 1991); *Mazo* v. *United States*, 591 F.2d 1151, 1156 (5th Cir.), cert. denied, 444 U.S. 842 (1979). The focus of this inquiry, however, is on whether the individual has significant control or authority over the enterprise's finances or general decision making. *E.g.*, *O'Connor* v. *United States*, 956 F.2d 48, 51 (4th Cir. 1992); *Hochstein* v. *United States*, 900 F.2d 543, 546 (2d Cir. 1990), cert. denied, 112 S. Ct. 2967 (1992); *Ruth* v. *United States*, 823 F.2d 1091, 1094 (7th Cir. 1987). The courts have considered a number of factors for this purpose: the formal corporate status of the employee; the ownership of stock or of an entrepreneurial stake in the corporation; the authority to write checks on corporate accounts; authority over the day-to-day operations of the corporation; authority to make decisions as to the disbursement of funds and the payment of creditors; and the authority to hire and fire personnel. See, *e.g.*, *Turnbull* v. *United States*, 929 F.2d at 178; *Bowlen* v. *United States*, 956 F.2d 723, 726-727 (7th Cir. 1992); *Hochstein* v. *United States*, 900 F.2d at 547; *Smith* v. *United States*, 894 F.2d 1549, 1553 (11th Cir. 1990).

Examining these factors in this case, the court of appeals correctly held that "the undisputed evidence establishes that [petitioner's] position in the Company met every one of these criteria" (Pet. App. 14a).[3]

[3] Concerning petitioner's suggestion that Anderson alone was responsible for tax payments, the court noted that petitioner "obviously possessed enough authority over corporate affairs to independently investigate Anderson and ultimately force him out" (Pet. App. 15a). The court's conclusion is fully supported by the record. The evidence established that petitioner went to Anderson's office and seized the books and

The court stated "that the undisputed evidence presented at trial so overwhelmingly leads to the conclusion that [petitioner] was a responsible party that a reasonable juror could not arrive at a contrary verdict" (Pet. App. 19a). This fact-bound determination of the court of appeals does not warrant further review.[4]

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records (5R. 62; 6R. 157), that, at petitioner's request, these records were examined and it was discovered that the withholding taxes had not been paid over to the government (5R. 64), and that Anderson also acknowledged to petitioner that the withheld taxes had not been paid (Pet. App. 6a).

[4] Petitioner argues (Pet. 15-24) that, although he had the status and authority, he did not have the duty to collect, account for and pay over the withholding taxes. He contends that he was "only responsible for the day-to-day functions of the operational side of the business" and "had no responsibility whatsoever for any of the 'financial' end of the business" (Pet. 19). That contention, however, is not supported by the record.

Petitioner reviewed and approved the majority of bills from creditors before sending them to Anderson for payment. According to petitioner's testimony, he occasionally would call Anderson and recommend that certain creditors be paid (Pet. App. 3a). Petitioner conferred with Anderson about major financial decisions of the corporation such as the acquisition of new equipment and the financing of that equipment, and, on at least one occasion, negotiated a loan for the purchase of new equipment (*id.* at 3a-4a). In addition, petitioner negotiated contracts with customers and decided how much to bid on projects (*id.* at 3a). Moreover, once the corporation began to experience financial difficulty, petitioner met with creditors to restructure the corporation's financing and hired an accountant to help examine the corporation's records (*id.* at 5a-6a). Petitioner was also an authorized signatory on all corporate

b. Petitioner contends (Pet. 8-11) that it was improper for the court to apply a "multi-factor" analysis in determing his responsibility for the payment of taxes. Petitioner argues that, even though he met every requirement of a "responsible person," the court of appeals could not properly find him "responsible" as a matter of law since the question whether an individual is "responsible" is inherently a question for the fact-finder (Pet. 10).

That contention is without merit. The extensive case law that defines in detail the characteristics of a responsible person "narrowly constrains a fact-finder's province in § 6672 cases" (Pet. App. 11a). As the court of appeals held, although the facts " 'are critical in * * * any § 6672 case[],' * * * certain facts will almost invariably prove dispositive of a finding of responsibility" (*id.* at 12a) (citation omitted). The courts of appeals have, in particular, consistently found "responsibility" as a matter of law when the uncontroverted evidence establishes that the taxpayer has authority over the corporation's financial or general decision making. *E.g.*, *Brounstein* v. *United States*, 979 F.2d 952 (3d Cir. 1992) (summary

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checking accounts and had the authority, which he exercised, to issue checks without permission from Anderson (*id.* at 4a).

It is not necessary to be the one who maintains the books and records, and the one who makes the calculation and payment of taxes, in order to be a "responsible person" under Section 6672. See *McGlothin* v. *United States*, 720 F.2d 6, 8 (6th Cir. 1983); *Gustin* v. *United States*, 876 F.2d 485, 492 (5th Cir. 1989). Rather, what is necessary is that the individual has sufficient authority over the finances of the corporation effectively to ensure or demand the payment of taxes. *Raba* v. *United States*, 977 F.2d 941, 943 (5th Cir. 1992). The undisputed evidence established that petitioner had such authority.

judgment); *Morgan* v. *United States*, 937 F.2d 281 (5th Cir. 1991) (same); *Williams* v. *United States*, 931 F.2d 805 (11th Cir. 1991) (judgment as a matter of law); *United States* v. *Strebler*, 313 F.2d 402 (8th Cir. 1963) (same); *Kalb* v. *United States*, 505 F.2d 506 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975) (directed verdict).[5]

c. Petitioner errs in contending (Pet. 11-12) that the analysis of the court of appeals conflicts with the decisions of the Seventh Circuit in *United States* v. *Charlton*, 2 F.3d 237 (1993), and the Fourth Circuit in *O'Connor* v. *United States*, 956 F.2d 48 (1992), and *Turpin* v. *United States*, 970 F.2d 1344 (1992).

In *Charlton* and *O'Connor*, as in the present case, the courts specifically held that the key to determining "responsible person" status is whether the individual has authority over an enterprise's financial or general decision making. In determining in those cases whether such authority existed, the courts examined the very factors considered by the court of appeals in this case. *United States* v. *Charlton*, 2 F.3d at 240; *O'Connor* v. *United States*, 956 F.2d at 51. Indeed, the court of appeals in the present case cited the analysis of the *O'Connor* decision with approval (Pet. App. 14a).

In *Turpin* v. *United States*, the only issue addressed by the Fourth Circuit was whether the

[5] Contrary to petitioner's contention, the grant of judgment as a matter of law in a civil case does not raise Seventh Amendment concerns (Pet. 19). This Court has specifically held that a "Rule 50(b) [motion for judgment as a matter of law] does not violate the Seventh Amendment's guarantee of a jury trial." *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 321 (1966).

taxpayer acted "willfully" in failing to pay over the corporation's withholding taxes. 970 F.2d at 1347. The court in *Turpin* assumed for purposes of its opinion that the taxpayer was a "responsible person." *Id.* at 1346 n.2. The court thus did not consider, much less reject, the multi-factor analysis properly used to determine "responsible person" status in this case.

2. Petitioner contends (Pet. 24-29) that his lack of knowledge of the corporation's tax deficiencies prior to April 12, 1982, absolves him from personal liability under this Court's decision in *Slodov* v. *United States*, 436 U.S. 238 (1978). The court of appeals correctly rejected that contention (Pet. App. 21a).

In *Slodov*, an individual acquired three corporations at a time when they owed $250,000 in withholding taxes and had no funds with which to pay the taxes. Although the corporation thereafter obtained funds sufficient to pay the taxes, the new owner used those newly acquired funds to meet current business expenses. This Court held that, because the new owner became responsible for the payment of taxes *after* the corporations' tax liability had accrued and *after* the funds available to satisfy that liability had been dissipated, he could not be compelled to pay the tax debt of the corporations' prior regime from the funds independently acquired after his assumption of control. 436 U.S. at 259-260.

In contrast to the new owner in *Slodov*—who first became involved with the corporation and first acquired responsible person status *after* the unpaid trust funds taxes had accrued and been dissipated—petitioner was responsible for the payment of taxes throughout the period when the delinquency accumulated. The courts of appeals have consistently held

that the reasoning of *Slodov* does not apply when, as here, the individual was responsible for the delinquent taxes both before and after they accrued. *Mazo*, 591 F.2d at 1154; *Caterino* v. *United States*, 794 F.2d 1, 6 (1st Cir. 1986), cert. denied, 480 U.S. 905 (1987); *United States* v. *Vespe*, 868 F.2d 1328, 1334 (3d Cir. 1989); *Garsky* v. *United States*, 600 F.2d 86, 91 (7th Cir. 1979); *Kizzier* v. *United States*, 598 F.2d 1128, 1134 (8th Cir. 1979); *Davis* v. *United States*, 961 F.2d 867, 872-875 (9th Cir. 1992), cert. denied, 113 S. Ct. 969 (1993).[6] There is thus no conflict among the circuits or other reason warranting further review.

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[6] The district court in *Johnson* v. *Commissioner*, 663 F. Supp. 294 (D. Utah 1987), held that a responsible person did not act willfully when he failed to pay over after-acquired funds subsequent to discovering that unpaid withholding tax liabilities existed. The reasoning of the district court in *Johnson* was specifically rejected by the Ninth Circuit in *Davis* v. *United States*, 961 F.2d at 877. In *Davis*, the court of appeals stated that, "contrary to the *Johnson* court's holding, neither *Slodov's* language nor its rationale compels excusing continuing management from liability under section 6672." *Ibid.* There is thus no conflict among the circuits on this issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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